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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 653.

FARBENFABRIKEN BAYER A.G.,

Petitioner,

v.

STERLING DRUG INC.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Sterling Drug Inc., respondent herein, respectfully submits that the Petition for a Writ of Certiorari in this case should be denied for the reasons hereinafter set forth.

Opinions Below.

The unanimous opinion of the United States Court of Appeals for the Third Circuit, filed August 9, 1962, is reported at 307 F. 2d 210 and is annexed to the Petition as Appendix A.

The opinions of the United States District Court for the District of New Jersey, filed July 15, 1957 and August 1, 1961, are reported at 153 F. Supp. 589 and 197 F. Supp. 627, respectively, and appear at pages 31a-38a and 190a-194a, respectively, of the printed Appendix prepared by

petitioner for use by the Court of Appeals and filed in this Court pursuant to Rule 21(4). The 1957 District Court opinion is also annexed hereto as Appendix A. The 1961 District Court opinion is also annexed to the Petition as Appendix B.

Questions Presented.

1. Should this Court grant certiorari in a private antitrust action, where provision for any public interest in the subject matter of the action has already been made in a decree entered in an antitrust suit brought by the United States, and where that decree is subject to revision or modification on an appropriate showing?

2. Does the ownership, use and assertion of registered United States trademarks acquired through purchase of stock from the Alien Property Custodian give rise to a private antitrust action by the former owner?

3. Is the power of the Alien Property Custodian so limited that an American purchaser at public sale of the vested capital stock of an American subsidiary of an enemy parent does not acquire the same rights of ownership he would acquire by direct purchase from the enemy parent?

4. Are petitioner's claims barred by the statute of limitations and the doctrine of laches?

5. Is a royalty-free license to use respondent's registered United States trademarks a remedy available to petitioner under the antitrust laws?

6. Is due process denied because the Court of Appeals in its unanimous opinion refers to a factual concession made by petitioner, where petitioner did not clearly limit

the concession and where neither the reference nor the concession is necessary to the Court's holding?

Introduction.

Petitioner, Farbenfabriken Bayer A.G. (herein called "Farben"*), is a corporation organized under the law of the Federal Republic of Germany (App.** 39a). It is engaged in the development, manufacture and sale of drugs, pharmaceuticals and other products, and conducts business, directly and through subsidiaries, in West Germany and in many areas throughout the world *(ibid.)*.

Respondent, Sterling Drug Inc. (herein called "Sterling"***), is a corporation organized under the law of the State of Delaware (*ibid.*). It is also engaged in the development, manufacture and sale of drugs, pharmaceuticals and other products, and conducts business, directly and through subsidiaries, in the United States and in many areas throughout the world (*ibid.*).

The complaint in this action (App. 6a-21a), filed September 28, 1955, purports to state a cause of action under

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* "Farben" is also used herein to refer, individually and collectively, to both petitioner and its alleged predecessors, I. G. Farbenindustrie A.G. (herein also called "I. G. Farben") and Farbenfabriken vorm. Friedrich Bayer & Company, both German corporations. The alleged succession is disputed by respondent but was conceded for the purposes of respondent's motions for summary judgment.

** "App." is used herein to refer to the printed Appendices prepared by the parties for use by the Court of Appeals and filed in this Court pursuant to Rule 21(4). "Pet." and "Pet. App." are used herein to refer, respectively, to the Petition and to the opinions of the courts below which are annexed to the petition and to this brief as appendices.

*** "Sterling" is also used herein to refer, individually and collectively, to both respondent and its predecessor, The Bayer Company, Inc., a New York corporation.

the antitrust laws of the United States. It charges (App. 8a-9a, 16a-20a) that Sterling has excluded Farben from participation in the American market for drugs and pharmaceuticals. This alleged exclusion is said to have been accomplished solely through Sterling's ownership, use and assertion of two registered United States trademarks, "Bayer" and the "Bayer Cross" ("Bayer" spelled vertically and horizontally in cross fashion) (*ibid.*).* Farben asserts (1) that it cannot sell its products in the United States without using those same trademarks (App. 17a-19a), (2) that Sterling's ownership, use and assertion of those trademarks somehow constitute a violation of the United States antitrust laws (App. 7a), and (3) that the District Court should therefore enjoin Sterling from enforcing its trademarks against Farben (App. 20a-21a).

On April 9, 1957, Sterling moved, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment in the District Court on the basis of the applicable statute of limitations. The theory of Sterling's motion was that a claim for relief against an alleged conspiracy in violation of the antitrust laws cannot prevail in the absence of an overt act, and that no such overt act had been alleged within the statutory period. It was, and is, Sterling's position that its ownership, use and assertion of registered United States trademarks do not constitute the necessary illegal overt act.

In its opinion, filed July 15, 1957 (App. 31a-38a; Pet. App. 1b-9b), the District Court upheld Sterling's theory and dismissed so much of Farben's complaint as sought the recovery of damages. However, because the relevant

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* The complaint alleged that, at the time of filing, this exclusion was in part accomplished through Sterling's ownership of United States patents which related to discoveries made by Farben (App. 18a-19a). However, it is conceded that all patents to which the complaint refers have since expired, and the allegations relating to these patents are no longer relied on.

statute of limitations is by its terms applicable only to actions at law*, the District Court refused to dismiss so much of the complaint as sought equitable relief (App. 37a-38a; Pet. App. 8b-9b). It noted that the claim to equitable relief rested "on rather tenuous grounds" (App. 37a; Pet. App. 8b), but gave Farben an opportunity to allege a fresh overt act.

Over the course of the next three years, Farben filed three pre-trial statements, and, as a result of pre-trial proceedings conducted by the District Court, joined with Sterling in a lengthy and detailed stipulation of fact (App. 39a-135a).

It having become apparent from these measures that Farben simply could not allege a fresh overt act, Sterling again moved pursuant to Rule 56 for summary judgment in its favor on April 22, 1960 (App. 148a). The theory of this motion was that the latest conceivable overt act alleged by Farben had been committed in 1923, and that Farben's claim to equitable relief was therefore barred by the doctrine of laches.

A motion for summary judgment pursuant to Rule 56 was also filed by Farben, on January 17, 1961 (App. 148a-49a). The theory of Farben's motion, and of its opposition to Sterling's motion, was that Sterling's assertion of its trademark rights necessarily involved an assertion of rights

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* Through that time, both parties and the District Court believed the applicable statute of limitations to be the New Jersey six-year statute (N. J. S. A. 2A:14-1). Subsequently, decisions of the Supreme Court of New Jersey and the Court of Appeals have made it clear that the applicable statute is the New Jersey two-year statute (N. J. S. A. 2A:14-10), *Addiss* v. *Logan Corp.*, 23 N. J. 142, 128 A. 2d 462, 465-66 (1957); *Gordon* v. *Loew's Inc.*, 247 F. 2d 451, (3d Cir. 1957); *Carlton Lamp Corp.* v. *General Electric Co.*, 254 F. 2d 815 (3d Cir. 1958); *Dean Oil Co.* v. *American Oil Co.*, 254 F. 2d 816 (3d Cir. 1958), *cert. denied*, 358 U. S. 835. The District Court later modified its opinion to reflect this fact (App. 192a). It is undisputed that the modification had no effect upon the substance of the District Court's decision.

acquired by Sterling through certain agreements executed in 1923 which are concededly in violation of the antitrust laws. Sterling denies this theory and contends that it relies entirely upon the rights it acquired by purchase of stock from the United States Alien Property Custodian in 1918.

In an opinion filed August 1, 1961 (App. 190a-94a), the District Court granted Sterling's motion and entered final judgment in its favor (App. 194a-95a). The basis of its decision was, as Sterling had contended, that Farben's equitable claims were barred by the doctrine of laches. Farben's motion was dismissed without opinion (App. 195a).

An appeal was taken by Farben to the United States Court of Appeals for the Third Circuit, which, on August 9, 1962, filed a unanimous opinion affirming the judgment of the District Court (Pet. App. 1a-7a). The Court of Appeals did not discuss either the statute of limitations or the doctrine of laches. Instead the Court simply held that the Alien Property Custodian had in 1918 conveyed to Sterling the right to exclusive use of the trademarks, and that the assertion of lawfully acquired trademarks did not constitute a violation of the antitrust laws.

A Petition for Rehearing or, in the Alternative, for Clarification was denied by the Court of Appeals without opinion on September 11, 1962.

Counter-Statement of the Case.

The brief opposing the petition in the companion case (No. 652) contains much of the history of the relationship between the parties which is necessary to an understanding of the issues presented in this case. Rather than extend this brief by stating again what is said there, Sterling respectfully refers the Court to its Counter-Statement of

the Case in No. 652. The Counter-Statement in this brief is confined to such additional material as pertains only to this case.

"Bayer" and the "Bayer Cross" were registered as trademarks in the United States in 1908 by Farbenfabriken of Elberfeld Company, a New York corporation wholly owned by Farben (App. 40a). In 1913 Farben dissolved Farbenfabriken of Elberfeld Company and transferred certain of its assets, including those trademarks, to The Bayer Company, Inc., a newly-formed New York corporation also wholly owned by Farben (hereinafter called "Bayer") (*ibid.*).

Bayer had been incorporated on June 12, 1913. There is in the record (App. 156a-57a) an extract from the minutes of a meeting held that day by Bayer's Board of Directors. Those minutes reflect the Board's approval of three contracts, two of which were to be executed with Farben. In one of the latter (App. 157a), Farben required Bayer to pay to it, within three years, the sum of $750,000 as consideration for Farben's consent to, and ratification of, the sale and assignment to Bayer of the business, including trademarks and goodwill, of Farbenfabriken of Elberfeld Company. This agreement conveyed full and complete rights in the trademarks with no limitation concerning time or use.

In the other contract (App. 158a-59a), Farben made Bayer the exclusive manufacturer and distributor of its products in the United States. This franchise was exclusive but was limited to a term of eight years. Nowhere in that or in any other contract did Farben reserve the right to distribute those products itself in the American market, under "Bayer" or the "Bayer Cross", or any other trademark. In return, Bayer agreed to pay, commencing three

years from the date of the agreement (when payment of $750,000 under the first contract would have been completed), one-half of its net profits arising from that manufacture and sale.

Since 1918, when Sterling purchased all of the outstanding capital stock of Bayer from the United States Alien Property Custodian, Sterling* has been the exclusive user of "Bayer" and the "Bayer Cross" in the United States (App. 40a).

In 1923, Bayer, Sterling and Farben entered into a series of contracts (hereinafter called the "1923 Contracts") which provided for a division of world sales territories in pharmaceuticals and related products for a minimum term of 50 years (App. 41a, 49a-77a). Sterling agreed to sell these products (except aspirin in Latin America) only in the United States, Canada and Cuba (App. 54a, 62a, 64a), and agreed to refrain from competing with Farben in the other markets of the world (App. 54a, 64a).

The contract between Farben and Bayer recognized Bayer's ownership of the trademarks:

> "WHEREAS New York are the proprietors of various trademarks in the United States of America including the name 'Bayer' and the 'Bayer Cross' trademark as applied to various products * * *." (App. 58a).

That agreement also provided that on its expiration

> "* * * the business together with the goodwill trademarks and unexpired patents shall *remain* the sole property of New York * * *." (App. 66a).**

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* Bayer was merged into Sterling as of December 31, 1942 (App. 39a).

** Emphasis supplied throughout this brief unless otherwise noted.

It is undisputed that the 1923 Contracts were illegal from their inception under the United States antitrust laws (App. 42a), and they were declared to be so in consent decrees entered in two actions* brought by the Antitrust Division of the Department of Justice against Sterling and certain of its subsidiaries or affiliates (App. 43a, 121a-22a, 130a-31a). Those decrees, entered September 5, 1941, were signed on behalf of the Department of Justice by Thurman Arnold, then Assistant Attorney General in charge of the Antitrust Division and now counsel for Farben (App. 126a, 134a).

Had it been necessary for the protection of the public interest in the restoration of fully competitive conditions to limit in some way Sterling's right to enforce its trademarks, such a provision could readily have been included in the decrees. This was not found necessary, however, and both decrees, as ultimately entered, expressly provided that nothing therein was to

> "* * * affect or diminish any right, title or interest of said defendants * * * in or to or under any heretofore acquired and presently existing * * * trademarks [and] trade names (such as the name 'Bayer' and the 'Bayer Cross' mark and registrations thereof) * * *." (App. 123a, 131a).

That these decrees were comprehensive and in the public interest was expressly recognized at the time of their

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* The consent decree in *United States* v. *Alba Pharmaceutical Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶ 56,150 (S. D. N. Y. 1941) (App. 119a-29a), declared unlawful those two of the 1923 Contracts which were executed between Farben and Sterling and between Farben and Winthrop Chemical Company, Inc. (a New York corporation wholly owned by Sterling). The consent decree entered in *United States* v. *The Bayer Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶ 56,151 (S. D. N. Y. 1941) (App. 129a-35a), declared unlawful the 1923 Contract, referred to above, which was executed between Farben and Bayer.

entry by Mr. Arnold. On September 25, 1941 Mr. Arnold issued a statement with respect to the decrees which said in part:

> "The settlement of this case was eminently satisfactory to me personally and to all the members of my staff who worked on it.
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> • • • • • •
>
> "In this case a consent decree was necessary to invalidate *for all future time the illegal contracts on which the criminal information was founded, to prevent the German Dye Trust* [petitioner's claimed predecessor] *from relitigating the same questions in civil suits between private parties, and to prevent the reestablishment of any future relationship of the same kind between Sterling and the German Dye Trust.*" (App. 10b).

In both cases, jurisdiction was expressly retained by the United States District Court for the Southern District of New York for any appropriate modification of those decrees (App. 125a, 133a-34a). At no time since 1941 has the Department of Justice sought to modify those decrees so as to grant any additional relief against Sterling, as, for example, providing that the trademarks "Bayer" and the "Bayer Cross", which were referred to in those decrees, should not be enforceable against Farben. It is clear from this that, so far as the Department of Justice is concerned, nothing further is necessary to restore the full vigor of competition, and there are no present illegal restraints of trade arising out of the relationship between Farben and Sterling from 1923 to 1941.

Petitioner properly refers (Pet. 27, n. 12) to Wilbur L. Fugate of the Department of Justice as an expert in the field of foreign commerce and the antitrust laws, and quotes an excerpt from a treatise by him pointing out that trade-

mark relief is included in antitrust judgments where it is appropriate to do so. It is of interest that Mr. Fugate has been personally connected with the very case dealing with the 1923 Contracts upon which petitioner relies. It was Mr. Fugate who appeared for the United States in supplemental proceedings which were commenced in 1952 for the purpose of making General Aniline & Film Corporation, an alleged assignee of certain of I. G. Farben's rights under the 1923 Contracts, a party to the 1941 decree, see *United States* v. *The Bayer Co.*, 135 F. Supp. 65 (S. D. N. Y. 1955). Yet at no time since the entry of that decree in 1941 has the Department of Justice moved for any modification thereof in respect of Sterling's trademark rights or charged Sterling with any attempt to enforce any right arising from the 1923 Contracts.

The Writ Should Not Be Granted.

Farben's petition shows, just as did its briefs below, clearly and unequivocally, the essential emptiness of its antitrust suit. Farben's object, as pointed out earlier, is to gain for itself the free use of trademarks which, it was stipulated, have been exclusively used in the United States by Sterling and its predecessors since 1917 (App. 40a). To justify an antitrust suit as a means of pursuing that objective, Farben asserts that Sterling is using those trademarks to exclude Farben from the American market.

This assertion is patently false. It has never been alleged, in the complaint or anywhere else in the record, that Farben cannot sell its products in the United States under other trademarks or that it has ever been prevented from doing so by Sterling.*

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* For example, Verona Pharma Chemical Corporation, a New Jersey corporation of which Farben directly or indirectly owns a

What has been alleged in the complaint is that sales by Farben in the United States without using "Bayer" and the "Bayer Cross" are not "commercially feasible" (App. 18a). What Farben really means is that it cannot do a nationwide business in the United States under other trademarks without incurring the expense of nationwide advertising. To avoid that expense, it is seeking a free ride on the enormous volume of advertising for which Sterling has paid since 1918 to build up consumer acceptance of goods trademarked with "Bayer" and the "Bayer Cross". The petition of course contains pious disavowals (e.g., Pet. 13) of any purpose to profit from the goodwill created by Sterling; the point remains, however, that Farben has no other apparent reason for its desire to use the trademarks.

As the author of the infringing pamphlet involved in *Sterling* v. *Harding*, Civ. Action No. 882-59 (D. N. J.), testified (App. 22b-24b), Farben apparently recognizes that the main obstacle to its entry into the American pharmaceutical market is *not* its inability to use Sterling's trademarks, "Bayer" and the "Bayer Cross". But even if it were, this is a self-imposed handicap. There is nothing in this record to show that when I. G. Farben was dissolved after World War II and certain of its assets turned over to the newly-organized petitioner, the name "Farbenfabriken Bayer A.G." was anything but a matter of voluntary choice. It is simply not credible that this choice was made in ignorance of the American trademark situation. Thus, to the extent

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majority interest, is engaged in the manufacture and distribution of drugs, pharmaceuticals and related products in the United States. In addition, The New York Times reported on October 17, 1961 (p. 60, col. 5) that Farben had caused the incorporation of another subsidiary, called F. B. A. Pharmaceuticals, Inc., to develop, manufacture and market ethical pharmaceutical specialties in the United States for Farben.

that inability to use "Bayer" and the "Bayer Cross" in the American market is an obstacle to petitioner's entry into that market, it is entirely a self-created obstacle.

Farben apparently has no quarrel with the holding of the District Court that an overt act is necessary to support a private action alleging an unlawful conspiracy under the antitrust laws. And Farben nowhere takes specific issue with the rule applied by that court that the ownership, use and assertion of registered trademarks does not supply the overt act. However, Farben finds that it cannot allege any other measure which could conceivably supply the missing overt act since 1923, which date is well beyond the period prescribed by the statute of limitations and the doctrine of laches. Consequently, Farben has sought to convert Sterling's subsequent exercise of its trademark rights against Farben into overt acts within the two-year statutory period by associating those rights with ancient illegal agreements.

Farben does this by charging that it and Sterling, or their predecessors, have on two occasions been parties to agreements dealing with the trademarks, and that Sterling's power to exclude Farben by asserting the trademarks against it has arisen from one or the other of those occasions. Since the series of contracts executed in 1923 was concededly illegal as containing a territorial allocation of markets (achieved in part, according to Farben, by a corresponding allocation of trademark rights*), Farben insists (Pet. 19-20) that the exercise, 20 years after termination of those agreements, of any power derived therefrom must be similarly unlawful. Alternatively, it is declared (Pet. 21), if the power to exclude was derived from the

* As shown, *infra*, the illegality of the 1923 Contracts existed entirely independent of any provision relating to trademarks.

earlier 1913 agreement, then that agreement also established a division of markets and it, too, is unlawful.

Neither contention is sound.

I.

The right to assert the trademarks against Farben was acquired by Sterling with its purchase of Bayer in 1918.

Sterling traces all of its rights in the trademarks to its 1918 purchase of Bayer, in whose name the trademarks were then registered. Under section 12 of the Trading with the Enemy Act, 40 Stat. 423 (1917) (amended by 40 Stat. 460 (1918)), as amended, 50 U. S. C. App. §12 (1958), the Alien Property Custodian was empowered to sell the American subsidiary as fully as could its prior enemy owner. Consequently, Sterling acquired with those trademarks the right of their exclusive use, even against Bayer's former parent.

If Farben and Sterling had negotiated the sale of Bayer directly between themselves, it is clear that by that sale Sterling would have acquired the exclusive right which is now challenged. This proposition is established by the Court's decision in *A. Bourjois & Co.* v. *Katzel*, 260 U. S. 689*. In that case, certain French manufacturers of face powder had sold their United States business, together with specific registered trademarks (including those there in issue) and goodwill, to plaintiff. Plaintiff then registered the same trademarks in its own name and continued the business, using the trademarks and the same form of box and label.

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* And *see Roger & Gallet* v. *Janmarie, Inc.*, 245 F. 2d 505 (C. C. P. A. 1957).

Defendant purchased a quantity of the same face powder from the French manufacturers and sold it in the United States in the latter's boxes, which resembled those used by plaintiff and bore similar trademarks.

In an action to restrain infringement, the District Court granted a preliminary injunction. This action was reversed by the Court of Appeals but restored by this Court, which said:

> "We are of opinion that the plaintiff's rights are infringed. After the sale the French manufacturers could not have come to the United States and have used their old marks in competition with the plaintiff. That plainly follows from the statute authorizing assignments. Act of February 20, 1905, c. 592, §10, 33 Stat. 727. If for the purpose of evading the effect of the transfer, it had [been] arranged with the defendant that she should sell with the old label, we suppose that no one would doubt that the contrivance must fail. There is no such conspiracy here, but, apart from the opening of a door to one, the vendors could not convey their goods free from the restriction to which the vendors were subject. Ownership of the goods does not carry the right to sell them with a specific mark." (260 U. S. at 691-92).

Defendant had argued that the trademark really belonged to the French manufacturers and indicated the French origin of the products.* This Court responded:

> "But that is not accurate. It is the trademark of the plaintiff only in the United States and indicates in law, and, it is found, by public understanding, that the goods come from the plaintiff although not made by it. It was sold and could only be sold with the good will of the business that the plaintiff bought.

* Farben makes a similar contention (Pet. 15).

> *Eiseman* v. *Schiffer*, 457 Fed. 473. It stakes the reputation of the plaintiff upon the character of the goods. *Menendez* v. *Holt*, 128 U. S. 514." (*Id.* at 692).

Although the *Bourjois* decision dealt with the voluntary, negotiated sale by a foreign parent of its American business, it is clear that the same result is reached where seizure and sale has been made by the Alien Property Custodian.

As the Court of Appeals noted, it was the unmistakable intention of Congress to empower the Alien Property Custodian to sell property as fully as the previous owner could. Section 12 of the Trading with the Enemy Act, *supra*, provides:

> "The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property * * * which has been or shall be * * * assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, * * * shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof * * *."

The Court of Appeals also quoted another section of the Act, which demonstrates the intention of Congress to give finality to all sales by the Alien Property Custodian:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the

> event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." (40 Stat. 416 (1917) (amended by 40 Stat. 1020 (1918)), as amended, 50 U. S. C. App. §7(c) (1958)).

In interpreting these provisions of the Trading with the Enemy Act, the decision below is in harmony with a decision from another Circuit, *Koppel Industrial Car & Equipment Co.* v. *Orenstein & Koppel A. G.*, 289 Fed. 446 (2d Cir. 1923).

In the *Koppel* case, defendant, a German corporation, had conducted an extensive railroad supply business in the United States prior to World War I under the name Orenstein-Arthur Koppel Company, and under the registered trademark "OAK." Both the corporate name and the trademark were used to describe defendant's business in all English-speaking countries. Defendant's entire American business was vested by the Alien Property Custodian and thereafter sold to plaintiff.

After the war, defendant changed its own name from Koppel-Orenstein & Koppel and Orenstein & Koppel, Limited to Orenstein and Koppel A. G., which the court thought to be an attempt to approximate the name under which it had conducted its pre-war American business. Defendant then set about rebuilding that business, representing that it was the successor to Orenstein-Arthur Koppel Company, using the trademark "OAK", and selling the same products to the same customers from offices in the same building as before the war.

The court held that, under the Trading with the Enemy Act, the Alien Property Custodian had power to sell enemy property as fully and as completely as could the former

owner. Since such former owner, after a voluntary sale, could not have later sought to impair the goodwill sold by it, a similar course of action was also barred after sale of the business by the Alien Property Custodian. Said the court:

> "*It was the apparent intention of Congress to sell enemy property as fully as the owner thereof could sell.* This was deemed necessary as a war measure. In the case of a going concern, which owned good will or trade-marks, it was clearly intended that these concerns should be kept going in order to engage in manufacturing or other enterprises which might be needed for the welfare of our country during this period; and it had the other purpose of crippling the enemy to the extent of preventing the enemy from enjoying its property or its profits during such period. Likewise, it was the intention of Congress that the American citizen, who was authorized to purchase at public sale, should, if the terms of sale so provided, be able to buy and enjoy his purchase as a going concern, thereby obtaining all that the German proprietorship consisted of at the time of sale. The language of the Trading with the Enemy Act clearly embraces this power of sale. To permit of the sale of the physical property only would have deprived the purchaser in the instant case of the great value of the good will of the German corporation, which had made its business and its growth during the preceding years. The conveyance by the bill of sale as referred to, conveyed 'the business as a going concern and the good will,' together with 'all registered and unregistered trade-marks * * * trade-names and the like,' and 'all privileges, franchises, and rights of every kind,' owned by the German corporation and its subsidiaries in the United States.

"We think this conveyed to the purchaser the exclusive right to carry on the business in the United States, with the right of protection of a court of equity from interference by the German corporation; for, if the present interference be permitted, what was conveyed would in time be destroyed. *The sale was as complete as if it were a voluntary conveyance of its interests in the United States by the German corporation.* It is not the case of a sale *in invitum* of the good will and business. Assuming a voluntary sale of its good will and business had been made by the German corporation, would it have been at liberty later to impair the good will by seeking the customers of the buyer and carrying on business, using substantially the same trade-name and trade symbol as they had theretofore used? We think not." (289 Fed. at 450-51).

II.

Sterling's right to assert its trademarks against Farben is therefore independent of the 1923 Contracts.

The basis of Farben's theory of its rights, as that theory is now stated, is that before 1923 Farben retained a right of concurrent use of "Bayer" and the "Bayer Cross", and that Bayer therefore had no right to assert the trademarks against its former parent (Pet. 10, 19).

This novel theory was not alleged in the complaint (App. 6a-21a). Moreover, it is simply without support, either in fact or in law.

Farben cannot claim that a right of concurrent use arose from actual concurrent use, since it has never alleged that either of the present petitioner's alleged predecessors ever used those trademarks in the United States. In fact, it has specifically declined to do so (App. 40a).

On the other hand, if Farben claims a constructive right of concurrent use, there is still no cause of action created under the antitrust laws. At most, Farben raises questions of trademark law or of the powers of the Alien Property Custodian.

Contrary to Farben's position, the 1923 Contracts themselves recognized that the trademarks were then owned by Bayer. The third recital in the agreement between Farben and Bayer (App. 58a-75a) stated as follows:

> "And Whereas New York are the proprietors of various trade marks in the United States of America including the name 'Bayer' and the 'Bayer Cross' mark as applied to various products * * *." (App. 58a).

What Farben complains of in the present litigation is the assertion by Sterling of certain rights arising from its exclusive and unchallenged ownership of two United States trademarks which have been registered in the name of Sterling or its predecessors since 1908 (App. 40a).

Sterling does not now base, nor has it at any time based, its claim of ownership of "Bayer" and the "Bayer Cross", and its claim to protection under the trademark laws, upon any provision of the 1923 Contracts. If it were to do so, it would be arguing that the remedy which Farben seeks is barred by an undertaking such as the following, which appears in the same agreement as referred to above:

> "Leverkusen [Farben] agree not to contest or in any way directly or indirectly put in issue the title of New York to their business property or rights including any of the said trade marks registered in the name of New York or used by New York or the exclusive right of New York to the name of Bayer and the Bayer Cross mark as applied to the said

> products in the United States of America, Canada, the United Kingdom and Ireland or in Cuba." (App. 59a).

At no time has Sterling relied on this or any similar provision. All that Sterling asserts in its counterclaim in this case and all that it asserted (App. 20b-25b) in *Sterling v. Harding, supra,* are the trademark rights which it has by reason of its purchase of Bayer from the Alien Property Custodian in 1918 (App. 40a), and the protection to which it is entitled by reason of almost 45 years of uninterrupted ownership and use.

Farben is totally unable to point to any express assertion by Sterling of rights under the 1923 Contracts. Its petition contains only such vague generalizations as the following:

> "Sterling acquired the right to restrain such competition only through the illegal uses made of these trademarks under the 1923 agreements. * * *
>
> "Sterling's power to restrict competition by German Bayer is because of these illegal agreements, substantially greater today than it would have been had the illegal agreement not been concluded but German Bayer had exercised its right to compete on the American market. * * *" (Pet. 19).

No support for these assertions is presented and no support exists.

If, by asserting rights accruing through ownership and use of the trademarks, Sterling were somehow asserting rights under the 1923 Contracts, Sterling would be guilty of contempt of the 1941 consent decree. That decree declared the 1923 Contracts illegal and enjoined Sterling from enforcing any of their provisions (App. 130a-31a). Yet, during the more than 20 years that have elapsed since

entry of that decree, Sterling at no time has been charged by the Department of Justice with a violation of its provisions.

On the contrary, in the only subsequent proceedings relating to that decree, the Department of Justice made it clear that it was not charging Sterling with a violation of its provisions. During the oral argument on January 8, 1952 of a motion by the United States for leave to make General Aniline & Film Corporation, an alleged assignee of certain of I. G. Farben's rights under the 1923 Contracts, a party to the decree, see 135 F. Supp. 65 (S. D. N. Y. 1955), Wilbur L. Fugate, Esq., representing the Department of Justice, stated:

> "The present proceeding is not for the purpose of changing or modifying the final judgment in this case in any particular but on the contrary, it is to protect that judgment.
>
> "This proceeding is not brought because of anything the present defendants [Bayer and Sterling] have done and no other or additional relief is sought in this action." (Transcript, p. 3).

III.

Farben's claims are barred by the statute of limitations and the doctrine of laches.

Even if, as Farben contends (Pet. 10, 19), its predecessor had a right of concurrent use of the trademarks during the period from 1918 to 1923, Farben still cannot prevail. Farben's complaint admits (App. 17a-18a), as the District Court carefully noted (App. 34a, 36a-37a; Pet. App. 4b, 7b), that the exclusion which it alleges to exist today is precisely the same as that which it claims was imposed by the 1923 Contracts (see App. 14a). Accordingly, as the

District Court held (App. 34a 36a-37a; Pet. App. 4b, 7b), any damage suffered by Farben resulted from events transpiring not later than 1923. Since no overt act has been alleged since then, Farben's action, brought 32 years later in 1955, is barred by the statute of limitations and the doctrine of laches.

This case shows very clearly the wisdom of those rules, whose purpose is to prevent the assertion of claims so old that they are difficult or even impossible to prove or disprove. In presenting its case, Farben's petition relies on an alleged inability, a half century after the fact, to prove execution of the 1913 agreements.

Further, this case is a dramatic example of the injustice which is threatened by the assertion of stale claims. Farben would have this Court completely ignore the enormous expenses incurred by Sterling in creating consumer acceptance of "Bayer" and the "Bayer Cross" since 1918 and the reliance of thousands of investors in Sterling's common stock, which since 1922 has been listed on the New York Stock Exchange, upon Sterling's continued exclusive ownership of those trademarks.

IV.

The decisions below do not conflict with this Court's decision in *Timken*.

Farben would have the Court believe that Sterling obtained the trademark rights it is now asserting from the 1923 Contracts, and that this is the principal reason those agreements were illegal. Such is not the case. Those agreements were illegal, not because they dealt with trademarks, but because they divided the markets of the world in pharmaceuticals and many other products. That the illegality inhered in the territorial allocations rather than the trade-

mark provisions of these contracts was recognized in the consent decrees which expressly declared that nothing therein was to

> "affect or diminish any right, title or interest of said defendants * * * in or to or under any heretofore acquired and presently existing * * * trademarks [and] trade names (such as the name 'Bayer' and the 'Bayer Cross' mark and registrations thereof) * * *." (App. 123a, 131a).

The same point was noted by the District Court with respect to these very contracts in the later proceedings relating to General Aniline & Film Corporation, *supra:*

> "Finally, although the preamble clauses recite that the agreement is intended to settle trademark disputes between the parties, a fair reading of the related covenants of the agreement establish that their dominant purpose was to divide the world market among the participants." (135 F. Supp. at 70).

The asserted conflict between the decisions below and *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, simply does not exist. The gravamen of the antitrust violation in *Timken* was an international division of markets, just as in the 1923 Contracts. Nothing in *Timken* suggests, however, as now contended by Farben, that it is an automatic and *per se* violation of the antitrust laws for one corporate entity to own and be free to assert a trademark in the United States, and for another corporate entity to own and be free to assert the same trademark in certain European countries. The evil arises when by contract or other agreement (but not in the 1923 Contracts) those trademarks are utilized as a device for elimination of competition between the two trademark owners.

Farben argues (Pet. 20-21) that, if Sterling is entitled to assert the trademarks against Farben (and hence, allegedly, to exclude Farben from the American market) independently of the 1923 Contracts, it must have acquired this right as a consequence of the 1913 agreement coupled with its 1918 purchase of Bayer. Therefore, it is urged, the 1913 agreement effected a division of markets as unlawful under *Timken* as that established in 1923 and the exercise of any rights thereby acquired must be enjoined.

Again, the arrangement that was before this Court in the *Timken* case was far different. The 1913 agreement between the predecessors of the present parties was a simple, straightforward sale of trademarks incident to the transfer of a going business. The *Timken* case is of course no authority for the proposition that all sales of trademarks are illegal under the antitrust laws.

V.

The decisions below do not conflict with the decision of the Court of Appeals for the Second Circuit in *Koppel*.

Neither a later opinion of the Court of Appeals for the Second Circuit in the *Koppel* case, 25 F. 2d 716 (1928), nor *American Bosch Magneto Corp.* v. *Robert Bosch Magneto Co.*, 127 Misc. 119, 215 N. Y. S. 387 (Sup. Ct. N. Y. Co. 1926)*, involved a charge on the part of the German company that the American company was guilty of violating the antitrust laws by asserting its trademarks against its former parent, nor, in fact, did either case involve any charge at all under the antitrust laws. Accordingly, the nature and scope of the relief granted there is not relevant here.

* Cited in Note 11 (Pet. 24).

VI.

The decisions below do not conflict with the policy of the antitrust laws; the remedy sought by Farben is not within their scope.

Even assuming that, as Farben contends, the trademark rights which Sterling asserts today arose only from the 1913 agreement or the 1923 Contracts, it is plain that Farben is not entitled to the relief which it seeks. This Court has held that the only sanctions available in private actions under the antitrust laws are those which were specifically provided by Congress, *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743.

Nowhere in the antitrust statutes is there any provision which even remotely sustains the remedy of a free compulsory license under a trademark in a private antitrust action. Sterling knows of no decision which has awarded such a remedy, and none has been cited by Farben. To the contrary, that remedy has already been specifically rejected by several of the District Courts, *Cott Beverage Corp.* v. *Canada Dry Ginger Ale*, 146 F. Supp. 300 (S. D. N. Y. 1956); *F. A. D. Andrea, Inc.* v. *RCA*, 14 F. Supp. 226 (D. Del. 1936), *aff'd*, 88 F. 2d 474 (3d Cir. 1937), *cert. denied*, 300 U. S. 681; *RCA* v. *Hygrade Sylvania Corp.*, 10 F. Supp. 879, 883 (D. N. J. 1934).

The authorities cited by Farben (Pet. 25-27) all involve antitrust actions brought by the United States Government; none involved, as here, a private antitrust action.

VII.

The decision below is not a denial of due process.

The last argument made in the Petition (Pet. 27-31) is that the Court of Appeals relied, in affirming the grant of Sterling's motion for summary judgment, on the provisions of contracts whose execution and performance had not been proved but had been conceded by Farben solely for purposes of its own motion for summary judgment.

First, it is not at all clear whether Farben did impose such a limitation on its concession in the Court of Appeals. Its main brief, while referring to the agreements on several occasions (Br. 18, 20, 21), made no reservation concerning their execution and performance. Its reply brief contains a footnote declaring that execution had not been proved (Br. 10) but, in a course of argument applicable to Sterling's motion as well as Farben's motion, treats the agreements as if they had nevertheless been performed (Br. 10-12).

Second, as pointed out earlier, Sterling traces its ownership of the trademarks to its purchase of Bayer from the Alien Property Custodian in 1918. It submits that by that purchase it acquired rights to the trademarks as full and complete as Farben itself could have voluntarily conveyed and that the execution or non-execution, and performance or non-performance, of the 1913 agreements are not material.

Conclusion.

For the reasons stated, the writ should be denied.

Respectfully submitted,

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January 10, 1963.

APPENDIX A.

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY

Opinion.

(Filed July 15, 1957)

WILLIAM F. SMITH, District Judge.

This is a civil action under the antitrust laws, and particularly Section 1 of the Sherman Act, as amended, 69 Stat. 282, 15 U. S. C. A. §1, and Sections 4 and 16, of the Clayton Act, 38 Stat. 731 and 737, 15 U. S. C. A. §§15 and 26. The action is brought by the plaintiff, a corporation organized under the laws of Germany, as the "legal successor in interest" to certain rights of Farbenfabriken vorm. Friedrich Bayer and Company, *et als.* The latter is hereinafter identified as "Friedrich Bayer and Company." The Complaint charges that the defendant and others, not named as defendants, are, and have been since 1918 engaged in a conspiracy in restraint of trade to the injury of the plaintiff. The plaintiff seeks to enjoin the alleged illegal restraint of trade and to enforce its claim for treble damages.

The defendant filed an answer in which it interposed as affirmative defenses: first, the bar of the statute of limitations, and second, the failure of the complaint to state a claim upon which relief can be granted. The defenses are raised at this time on the dual motion of the defendant, to wit, a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., and a motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure, *supra.* The arguments advanced by the defendant in support of the motion are directed primarily to the allegations of the complaint.

These motions, although cast in the form of motions for judgment under the said rules, we shall treat as appropriate motions to dismiss the complaint on the grounds stated.

COMPLAINT.

The complaint alleges generally that the defendant, and others not named, are, and have been, engaged in a con-

spiracy in restraint of trade in violation of the antitrust laws to the injury of the plaintiff. This general allegation, which pervades the complaint, is supported by specific allegations contained in 51 paragraphs. It should be noted that many of the paragraphs contain nothing more than a recital of the history of the plaintiff and its predecessors; this recital is relatively unimportant at this time. The essential allegations of the complaint may be briefly summarized. The references hereinafter made to the plaintiff and defendant may be regarded as including their predecessors, except where it is otherwise noted.

The complaint alleges that: (1) The plaintiff and defendant are, and have been, engaged in the manufacture, sale and distribution of similar drugs and pharmaceutical products; (2) the defendant is, and has been, so engaged within the United States and in various other parts of the world; (3) the defendant is, and has been, directly and indirectly engaged in interstate and foreign commerce; (4) the plaintiff is, and has been, similarly engaged, except to the extent that its commerce within the United States is, and has been, limited by the alleged illegal restraints imposed upon it by the conduct of the defendant; (5) the defendant, by its conduct restrains, and has restrained, the plaintiff's entry into such commerce within the United States "to the extent necessary to permit a commercially feasible operation in the field of drugs and pharmaceuticals"; (6) the defendant, pursuant to and in furtherance of a conspiracy in restraint of trade, has gained complete control of a "substantial segment of the * * * market in the products" developed and produced by the predecessors of the plaintiff, to wit, Friedrich Bayer and Company and its subsidiary Bayer Co., Inc., of New York; (7) the defendant, in violation of the antitrust law, excludes, and has excluded, the plaintiff from the commercial market within the United States. The allegations herein summarized, couched in the most general terms and not particularized, are contained in paragraphs 1 to 12, inclusive, of the complaint.

The complaint further alleges that: (1) with the advent of the First World War, the Alien Property Custodian seized the assets of Friedrich Bayer and Company, includ-

ing the stock of its wholly owned subsidiary Bayer Co., Inc., of New York; (2) these assets, including the aforesaid stock, were sold to Sterling Products, Inc., a predecessor of the present defendant; (3) the predecessor of the present defendant thus acquired the ownership and control of certain trademarks, including the well-known "Bayer Cross" and the trade name "Bayer"; (4) thereafter, between 1920 and 1923, the predecessors of the present litigants negotiated and executed certain contracts under which the predecessor of the defendant acquired certain rights, including trademarks, patents and secret processes not identified in the complaint; (5) these contracts, concluded in 1923, were negotiated and executed by the predecessors of the plaintiff under "economic duress"; (6) the predecessor of the defendant registered the trademarks, acquired from the Alien Property Custodian, in the United States and in other countries.

The complaint further alleges that: (1) the contracts of 1923 were illegal and an imposition on the plaintiff's predecessors; (2) the defendant's predecessor acquired under these contracts complete control of trademarks, patents and secret processes theretofore owned by the plaintiff's predecessors; (3) the defendant and its predecessor, by its ownership and use of the trademarks, patents and secret processes thus acquired, are, and have been, in such control as to exclude the plaintiff and its predecessors from the commercial market within the United States; (4) the exclusion is, and was, "as effective as it had been under the illegal agreements of 1923." The specific charge, as we construe the allegations of the complaint, is that the defendant, having gained control of the commercial market by its acquisition of trademarks, patents and secret processes, continues to exercise that control, and, by the exercise of that control, excludes, and has excluded, the plaintiff and its predecessors from the commercial market within the United States.

The contracts, to which reference is hereinabove made, are not before the Court, but it is conceded that these contracts were held to be in violation of the antitrust laws in a final judgment entered in the United States District Court,

Southern District of New York, on September 5, 1941 (United States *v.* Alba Pharmaceutical Company, Inc., *et al.*, Civil Action No. 15-363). The present defendant was a party to that action and consented to the entry of the final judgment.

We shall assume for the purpose of discussion, but without deciding the general issue raised by the pleadings, that the conspiracy in restraint of trade, as charged in the complaint, existed, and that the conduct of the defendant and its predecessor, prior to 1941, was in furtherance of that conspiracy. This assumption is necessary if the allegations of the complaint are to be viewed in the light most favorable to the plaintiff, a course which must be adopted at this stage of the proceedings.

There is no specific allegation in the complaint that subsequent to 1941 the defendant committed any overt act in furtherance of the alleged conspiracy. There is a general allegation that the plaintiff and its predecessors have been excluded from the commercial market within the United States since 1949 but this alleged exclusion, as we view it, cannot be regarded as an overt act; it must be regarded as the consequence of the earlier conduct of the defendant and its predecessor, the injury of which the plaintiff complains and for which it seeks redress in this action.

If the exclusion of the plaintiff and its predecessors from the commercial market in the United States is ascribable to the conduct of the defendant and its predecessor, it is ascribable solely to the conduct of the defendant and its predecessor between 1918 and 1941. The exclusion, if it existed, became effective in 1923, when the agreements were concluded, and continued thereafter without any affirmative act by the defendant or its predecessor. It is not without significance that the plaintiff itself charges that the restraint of trade is, and was, occasioned by the earlier conduct of the defendant and its predecessor, particularly the acquisition of the trademarks, patents and secret processes, under the alleged illegal contracts.

There is a further allegation which should be considered. It is alleged in paragraph 47 that: "During 1954 and

1955 Sterling attempted by threats and intimidation to obtain from Bayer a waiver of its legal rights." It is further alleged "Bayer resisted all pressures. It refused to accede to demands to exclude it. It refused to acquiesce in the continuance of Sterling's monopoly and restraint against it." There is no allegation that the intimidation was the proximate cause of any injury to the plaintiff. Therefore, even if we regard it as an overt act, it is not such an overt act as will support a claim for damages. This conclusion, we believe, is supported by our later discussion. We are of the opinion that the allegation is mere surplusage.

Claim for Damages

The defendant contends that the plaintiff's claim for damages is barred by the applicable statute of limitations. The pertinent provisisons of the statute upon which the defendant relies, read as follows: "Every action at law * * * for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, * * * shall be commenced within 6 years next after the cause of any such action shall have accrued." N. J. S. 2A:14-1, N. J. S. A. 2A:14-1. The statute is applicable but it is necessary that we determine when the cause of action accrued.

A civil action for conspiracy is essentially an action in tort. It is well established that such an action cannot be maintained in the absence of: first, the overt act of one or more of the conspirators in the furtherance of the conspiracy; and second, the consequential damage to the rights of another of which the overt act is the proximate cause. The gravamen of the action lies not in the conspiracy but in the overt act. A cause of action accrues upon the commission of an overt act followed by damage to another of which the overt act is the proximate cause. The statute of limitations runs from the commission of the last overt act alleged to have caused damage. Park-in Theatres *v.* Paramount-Richards Theatres, D. C., 90 F. Supp. 727, affirmed 3 Cir., 185 F. 2d 407, certiorari denied 341 U. S. 950, 71

S. Ct. 1017, 95 L. Ed. 1373; see also: Northern Kentucky Tel. Co. *v.* Southern Bell T. & T. Co., 6 Cir., 79 F. 2d 333, 335, 97 A. L. R. 133, certiorari denied 294 U. S. 719, 55 S. Ct. 546, 79 L. Ed. 1251; Steiner *v.* 20th Century-Fox Film Corporation, 9 Cir., 232 F. 2d 190, 194-195. The victim of the conspiracy may continue to suffer damage long after the last overt act has been committed, but, if he is to preserve his cause of action, he must commence suit within the period defined by the applicable statute of limitations. *Ibid.*

The rule is discussed in Steiner *v.* 20th Century-Fox Film Corporation, *supra.* The language of the Court is apposite. It is therein stated, 232 F. 2d at page 194: "The question: When does the statute of limitations begin to run? points to the first problem which must be here resolved. Appellant contends that where damages are in their nature continuing the statute runs from the date of the last injury. Under this view the statute of limitations would not run until all injury to a claimant had ceased. We must disagree. In a civil conspiracy, the statute of limitations runs from the commission of the last overt act alleged to have caused damage." (Citations omitted.)

It is further stated in the opinion of the Court, 232 F. 2d at page 195: "In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck. Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run. Otherwise, in a continuing conspiracy, the cause of action of an injured party would never fully develop, nor would there be any limitation upon the right of action, and the beneficent purpose of the statute to delimit the right to sue would be defeated." (Citations omitted.)

The plaintiff contends that it seeks to recover only those damages which it has sustained within the six year period next preceding the commencement of the action. These damages are not recoverable in the absence of a

specific allegation that they were proximately caused by an overt act committed within the same period. The complaint fails to allege such an overt act.

These damages, if we interpret the allegations of the complaint correctly, are ascribed by the plaintiff to the conduct of the defendant prior to 1941, and particularly its conduct between 1920 and 1923, when, it is alleged, the defendant illegally acquired the trademarks, patents and secret processes theretofore owned by the plaintiff's predecessors. It should be noted that the Court is unable to fix with certainty the date of the last overt act but this is due entirely to the complete lack of particularity in the complaint. There is no allegation, however, that the defendant committed any overt act in furtherance of the conspiracy after 1941.

There is a general allegation that the plaintiff is, and has been, excluded from the commercial market within the United States, but this exclusion has been effective, according to the allegations of the complaint, since 1923. This exclusion, we have heretofore held, was not an overt act but the consequence of the earlier conduct of the defendant and its predecessor, the injury of which the plaintiff complains and for which it seeks redress.

We are of the opinion that the claim for damages here asserted by the plaintiff is barred by the statute of limitations for the reasons hereinabove discussed.

The defendant further contends that the complaint should be dismissed because of its failure to state a claim upon which relief can be granted. This contention is meritorious. We are of the opinion that in a civil action for conspiracy the complaint should *Allege With Particularity* an overt act within the period defined by the statute of limitations. Since the gravamen of the action is the overt act, the allegation of an overt act within the said period is essential to the statement of a claim for relief. There is no such allegation in the present complaint.

The claim for damages will be dismissed for the reasons hereinabove discussed, but without prejudice to the right of the plaintiff to apply to the Court for leave to file an

amended complaint. This should not be interpreted as an open invitation to merely redraft the allegations contained in the present complaint. An amended complaint will not be entertained unless the plaintiff can aver with particularity an overt act within the statutory period.

THE CLAIM FOR EQUITABLE RELIEF.

The bar of the statute of limitations may not be invoked as a defense against the plaintiff's claim for equitable relief. The statute of limitations, by its express terms, applies only to actions at law.

There remains for consideration, however, the motion of the defendant to dismiss the complaint for failure to state a claim upon which relief can be granted. The claim for equitable relief may appear to rest on rather tenuous grounds, but at this stage of the proceeding the complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed "unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of [its] claim." Frederick Hart & Co. *v.* Recordgraph Corporation, 3 Cir., 169 F. 2d 580, 581. We are of the opinion that the complaint, tested by this standard, is sufficient to withstand the present attack. The motion to dismiss the complaint on the ground stated will, therefore, be denied.

We observe that the complaint charges in the most general language: first, that the defendant and others not named, are, and have been, engaged in a conspiracy in restraint of trade, in violation of the antitrust laws, to the injury of the plaintiff; second, that the defendant has gained control of the commercial market within the United States by its acquisition of trademarks, patents and secret processes in furtherance of the conspiracy; and third, that the defendant, by the exercise of this control, excludes the plaintiff from the said market. These charges are clothed in descriptive language which adds nothing to the essential allegations of the complaint. We are of the opinion that in the interest of orderly procedure the plaintiff should file with the

Court, and serve upon the defendant, a more definite statement. This should be done at least thirty days in advance of the pretrial conference, if not sooner.

The more definite statement should contain: first, adequate references to the particular patents relied upon, together with their date of issuance; second, a description of the trademarks sufficient to identify them; third, a description of the secret processes sufficient to identify them; fourth, a statement of the manner in which the plaintiff is alleged to have acquired ownership of the aforesaid, whether from the Alien Property Custodian or under the contracts referred to in the complaint; and fifth, such other factual information as may assist in defining the issues with particularity.

Motion to Stay Taking of Depositions.

The motion of the defendant to stay the taking of depositions is dismissed.

Application for Counsel Fees.

The attorneys for the plaintiff have applied to the Court for an allowance of counsel fees to be assessed against the defendant. This application is denied.